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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF IDAHO; IDAHO DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho; and GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources,

Defendants,

IDAHO HOUSE OF REPRESENTATIVES; MEGAN BLANKSMA, in her official capacity as Majority Leader of the House; IDAHO SENATE; and CHUCK WINDER, in his official capacity as President Pro Tempore of the Senate,

Intervenor-Defendants,

JOYCE LIVESTOCK CO.; LU RANCHING CO.; PICKETT RANCH & SHEEP CO.; IDAHO FARM BUREAU FEDERATION,

Intervenor-Defendants.

Case No. 1:22-cv-00236-DCN

IDAHO LEGISLATURE'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT [Dkt. 53]

Table of Contents

Table of Authorities ii

I. INTRODUCTION 1

II. ARGUMENT 1

A. The Agencies admit the material facts in this case 1

B. The Idaho statutes do not unconstitutionally burden the Agencies' grazing programs 5

1. The Agencies cannot hide their preemption argument under the cloak of intergovernmental immunity 5

2. The Idaho water code does not discriminate against the Agencies 6

a. Idaho's forfeiture procedures are not discriminatory 6

b. Codification of the longstanding common law of stockwater appurtenance is not discriminatory 7

c. The Agencies have waived their opposition to beneficial use 8

d. The Agencies are not harmed by a law that requires water on their lands to be used on their lands for a use that they permit 9

e. Legislative intent cannot give rise to a cause of action 9

C. The Agencies never converted their partial decrees into property and they misread the State's defense to forfeiture 10

D. The Agencies' settlements are unchanged by appurtenance or forfeiture procedures 12

E. None of the challenged statutes are retroactive and a prospective defense to forfeiture doesn't make them so 13

F. A plaintiff is not a defendant and a statute is not a lawsuit 15

G. Where the balance of equities and public interest favor the State and no harm has come to the Agencies, injunctive relief is not warranted 17

III. CONCLUSION 20

Table of Authorities

Page(s)

Cases

Bean v. Morris,
221 U.S. 485 (1911)....................19

Big Wood Canal Co. v. Chapman,
263 P. 45 (Idaho 1927)....................11

Cal. Or. Power Co. v. Beaver Portland Cement Co.,
295 U.S. 142 (1935)....................20

California v. United States,
438 U.S. 645 (1978)....................12

Freedom to Travel Campaign v. Newcomb,
82 F.3d 1431 (9th Cir. 1996)....................16

Frisbie v. Sunshine Mining Co.,
457 P.2d 408 (Idaho 1969)....................13

George v. Morris,
736 F.3d 829 (9th Cir. 2013)....................8

Henderson v. Terhune,
379 F.3d 709 (9th Cir. 2004)....................9

In re Hidden Springs Trout Ranch,
636 P.2d 745 (Idaho 1981)....................14

Joyce Livestock Co. v. U.S.,
156 P.3d 502 (Idaho 2007).................... *passim*

Kleppe v. New Mexico,
426 U.S. 529 (1976)....................10

Lyng v. Nw. Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988)....................9

Martinez-Serrano v. Immigr. and Naturalization Serv.,
94 F.3d 1256 (9th Cir. 1996)....................8

McInturff v. Shippy,
447 P.3d 937 (Idaho 2019)....................11, 12

MedImmune, Inc. v. Genetech, Inc.,
549 U.S. 118 (2007)........15

Melendres v. Maricopa Cnty.,
897 F.3d 1217 (9th Cir. 2018)........20

North Dakota v. United States,
495 U.S. 423 (1990)........10

Santillan v. U.S.A. Waste of Cal., Inc.,
853 F.3d 1035 (9th Cir. 2017)........13

Sveen v. Melin,
138 S. Ct. 1815 (2018)........18

United States v. California,
921 F.3d 865 (9th Cir. 2019)........6

United States v. Lewis Cnty.,
175 F.3d 671 (9th Cir. 1999)........16, 17

United States v. Orr Water Ditch Co.,
256 F.3d 935 (9th Cir. 2001)........10, 11

United States v. U.S. Bd. of Water Comm'rs,
893 F.3d 578 (9th Cir. 2018)........20

Statutes

43 U.S.C. § 666(a)........15

I.C. § 42-113(2)(b)........7, 12, 14, 18

I.C. § 42-114........14

I.C. § 42-222........*passim*

I.C. § 42-223........14

I.C. § 42-223(6)........4

I.C. § 42-224........*passim*

I.C. § 42-501........5, 9, 10

I.C. § 42-502........5, 8, 14

I.C. § 42-504........5, 9, 14, 18

I.C. § 42-1701........19

I.C. § 42-1805 19

Idaho Code § 73-101 ....14, 15, 19

Idaho Admission Act of 1890 ....9, 19

Other Authorities

Idaho Constitution, art. XI, § 12 19

Idaho Constitution, art. XV, § 1 9

Carol Hardy Vincent, Laura Hanson, Lucas Bermejo, Cong. Rsch. Serv., R42346, Federal Land Ownership: Overview and Data (2020) 7

I. INTRODUCTION

The BLM and Forest Service (the "Agencies") have waived their claim that their stockwater rights can never be forfeited for nonuse under Idaho's 1903 forfeiture statute. But they continue to argue that they are not bound by Idaho's statutory procedures for determining whether forfeiture is required under the 1903 law. The Agencies fail to recognize that the partial decrees they received from the SRBA Court are simply not at issue. They admit that they have not used the water decreed to them to water their livestock over the last five years—the only time period relevant to forfeiture. The State Defendants must, therefore, determine whether a forfeiture lawsuit should be filed in the SRBA Court. Until such time as the Idaho Attorney General sues the Agencies for forfeiture, their sovereign immunity defense is not ripe.

Idaho's laws establishing procedures for a forfeiture determination, as well as the other challenged statutes, rest comfortably within the bounds of the federal and state constitutions.

II. ARGUMENT[1]

A. The Agencies admit the material facts in this case

The Agencies admit:

- "The United States . . . filed SRBA claims for thousands of state law-based stockwater rights."[2]
- "[B]eneficial use is the measure of state-law based water rights in Idaho, including those held for federal agencies."[3]
- "Most of the United States' state law-based stockwater claims were 'beneficial use' claims."[4]

[1] The Idaho Legislature supports the State Defendants' reply brief, Dkt. 64, and has endeavored to avoid duplication in this filing.

[2] Dkt. 61 ¶ 7 (admitting State's fact at Dkt. 44 ¶ 7).

[3] Dkt. 60, at 75.

[4] Dkt. 61 ¶ 8 (admitting State's fact at Dkt. 44 ¶ 8).

- "[During the SRBA and now], the United States did not own the livestock that consumed water under the rights."[5]

- "[T]he United States . . . does not challenge . . . the Idaho Supreme Court's decisions."[6] "[T]he United States may not now seek to resurrect the rights disallowed in *Joyce*."[7]

- "[T]he United States does not challenge [Idaho's forfeiture statute, I.C. § 42-222(2), enacted in 1903]." "Idaho has effectively operated for over a century under laws that did not present these legal violations."[8]

- Before codification of I.C. § 42-224, "no statutory procedures existed for applying I.C. § 42-222(2)."[9]

- "Of course, Section [42-]224 only applies to future forfeiture proceedings."[10]

- For purposes of the McCarran Amendment, the SRBA court defines administration of decreed rights to include "how each water right on a source is diverted and used."[11]

These admissions do not square with the Agencies' contradictory arguments. Two themes run through the Agencies' response. *First*, that the Idaho law providing a principal/agent defense to forfeiture actually is a retroactively-imposed element of their decreed rights. *See, e.g.*, Dkt. 60, at 31, 41-42 ("[F]orfeiture proceedings seek to re-adjudicate the United States' rights."),

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[5] Dkt. 60, at 63.

[6] *Id.* at 78.

[7] *Id.* at 54, referencing *Joyce Livestock Co. v. U.S.*, 156 P.3d 502 (Idaho 2007) ("*Joyce*").

[8] *Id.* at 50, 70 ("This case does not concern whether the United States' stockwater rights are immune from any forfeiture under state law."), 71-72, 74; *id.* at 96. *But see*, "this Court should permanently enjoin . . . Idaho Code . . . 42-222(2)." *Id.* at 89. If this Court finds that the Agencies are still seeking to enjoin I.C. § 42-222(2), the Legislature joins the State Defendants' reply, Dkt. 64, at 10-20.

[9] Dkt. 34-1, at 21.

[10] Dkt. 60, at 59.

[11] *Id.* at 39.

63, 67.[12] [13] The Agencies misconstrue the plain meaning of the principal/agent statute (I.C. § 42-224(4)) that does not modify any stockwater rights. Rather, it provides the Agencies with a defense to a forfeiture action consistent with the Idaho Supreme Court's ruling in *Joyce,* a ruling that they do not challenge. I.C. § 42-224(4); *Joyce*, 156 P.3d at 519; note 7, *supra*. The relevant time period for application of that defense is the 5-year period prior to the Director's receipt of a petition seeking to forfeit a stockwater right. I.C. §§ 42-222(2), 224(1). In this action, the 5-year period reaches back at most to 2016, two years after entry of the Final Unified Decree ("FUD") in the SRBA (Dkt. 13, at 116-42) and even longer after the partial decrees for the specific rights at issue (Dkt. 13, at 38-106). The existence, or lack thereof, of a principal/agent relationship during those five years does not amend the SRBA's partial decrees entered well before then. Instead, such evidence defeats a possible show cause order. Under both I.C. §§ 42-224(1), (11) and 42-222(2), forfeiture is based solely on clear and convincing evidence of nonuse of the stockwater right for a term of five years. The Agencies understand the difference between elements of a valid water right that preclude forfeiture and a defense to forfeiture. They submitted a principal/agent agreement[14] to the Idaho Department of Water Resources ("IDWR") as a defense to a show cause order for a Forest Service stockwater right. Dkt. 35 ¶ 16, Ex. 2. The underlying right was the same before and after IDWR's dismissal of the forfeiture petition.

The Agencies also do not challenge *Joyce*'s holding that they do not have a stockwater

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[12] The Agencies press this same argument in their Property Clause analysis, suggesting that the principal/agent exemption is a retroactive cloud on their partial decrees. Dkt. 60, at 49-50. As explained below, the Agencies lack property rights for failure to ripen their inchoate decrees into water appropriations through beneficial use, not because of any act of the Idaho Legislature.

[13] Similarly, the Agencies argue that the defense violates Idaho's Constitution. The argument is defeated at § II(E), *infra*.

[14] The Idaho Legislature does not agree with IDWR that the Agencies' proffered agreement met the standards under Idaho law for a valid principal/agent relationship. *See* Dkt. 53-1, at 25.

right to water their grazing permittees' livestock; they only have a right to water their own livestock. *Joyce*, 156 P.3d at 519; note 6, *supra*. Consequently, absent a principal/agent defense, the Agencies cannot avoid forfeiture if they do not use their decreed rights to water their livestock. *Joyce* rebuffed the BLM's argument that its ownership, control, and management of the public land grazing allotments was sufficient to hold a water right. More is required; namely, use of that water by BLM's livestock or acquisition of the water right by a permittee acting as BLM's agent. *Joyce*, 156 P.3d at 519. In addition to the principal/agent relationship, other exceptions and defenses to forfeiture are codified in Idaho's water law such as uncontrollable circumstances. I.C. § 42-223(6). The Agencies suggest they may invoke this defense. Dkt. 60, at 77. But this is not the forum or case in which to adjudicate the merits of that or any other defense. Instead, the Agencies have every right to present these defenses via the procedural framework established in I.C. § 42-224, first before the IDWR as they have already done and, if needed, again in the SRBA Court. I.C. § 42-224(4), (11).

Second, the Agencies argue as part of their Property Clause analysis and elsewhere that the FUD validated their right to hold for all time stockwater rights to water their grazing permittees' livestock. *See, e.g.*, Dkt. 60, at 53 ("[T]he rights continue to be used in the same manner as at the time of their decree."), 72 ("Given that the SRBA court confirmed the United States' rights in the [FUD], the continued use of those rights in the same manner as at time of the decrees provides no basis for forfeiture."). The Agencies, however, admit that Idaho's forfeiture statute, I.C. § 42-222(2), applies to them. *See* note 8, *supra*. That statute requires beneficial use at some point in the last five years.

Contrary to the Agencies' position, the SRBA Court did not need to expressly condition their rights on compliance with § 42-222(2). Dkt. 60, at 63. Forfeiture does not void the

Agency's stockwater rights ab initio; it voids them at the time the SRBA Court adjudges them forfeited based on the last five years. I.C. § 42-224(12). The 2014 FUD did not address whether the Agencies needed to water their livestock or have an agent water the agent's livestock. The FUD's silence did not contravene the Idaho Supreme Court's prior *Joyce* decision that made clear that the Agency's understanding of water law was wrong. *Joyce*, 156 P.3d at 520. *Joyce* informed the Agencies that they had a duty to water their livestock or risk forfeiture. Nor could a contrary IDWR policy overturn *Joyce*. Dkt. 60, at 64. Instead, the Legislature could affirm *Joyce* or amend it, subject to the constraints of the Idaho Constitution. The legislature affirmed it. I.C. §§ 42-501, 502, 504. Beneficial use is a tenet of Idaho water law that the Agencies admit applies to their decreed rights. *See* note 3, *supra*. The Agencies admit they have not used their water rights to water their own livestock. *See* note 5, *supra*.

B. The Idaho statutes do not unconstitutionally burden the Agencies' grazing programs

1. The Agencies cannot hide their preemption argument under the cloak of intergovernmental immunity

The Agencies' intergovernmental immunity argument is really a preemption argument that is subject to higher standards and presumptions unfavorable to the Agencies. (Dkt. 53-1, at 13-17). The Agencies respond that they did not assert obstacle preemption in their opening brief. Agreed. The Agencies expressly disclaimed that they were making a preemption argument. Dkt. 34-1, at 25 n.9. But in their response, they repeat their opening brief assertions that "Idaho's actions . . . obstruct the federal agencies from accomplishing their missions." *Id.* at 95; Dkt. 60, at 90. The Agencies claim these obstacles only demonstrate harm in support of injunctive relief, *id.* at 26, and are not offered to support their Supremacy Clause argument. They can't have it both ways. The Agencies are seeking to enjoin the alleged obstacles to their

federal grazing programs in order to preempt the alleged harm.[15] As explained by the Ninth Circuit in *United States v. California*, the difference between obstacle preemption and intergovernmental immunity matters. 921 F.3d 865, 880 (9th Cir. 2019). Under obstacle preemption, historical state police powers are not preempted unless Congress clearly and manifestly intended to do so. Dkt. 53-1, at 14. The Court must assume a valid exercise of the Legislature's police power. *Id.* Obstacle preemption requires examination of the statutes as a whole. *Id.* And a "freewheeling judicial inquiry" into state laws in tension with federal objectives is not appropriate. *Id.*

2. The Idaho water code does not discriminate against the Agencies

If the Court adopts the intergovernmental immunities analytical framework, the Agencies have not shown that Idaho's water code discriminates against them.

a. Idaho's forfeiture procedures are not discriminatory

Idaho Code § 42-224(4)'s principal/agent defense to forfeiture benefits the Agencies (and state agencies) who can call upon this defense whenever the IDWR or SRBA Court are considering a forfeiture petition or finding. The statute disadvantages private stockwater right holders who cannot avail themselves of this statutory exemption and who must instead rely on the common law in *Joyce* and other cases. *Joyce*, 156 P.3d at 519 (citation omitted).

The Agencies' hyperbolic fear of "mass forfeiture" from the statute (Dkt. 60, at 28) assumes there will be mass petitions seeking forfeiture of government stockwater rights followed by mass IDWR findings of forfeiture and mass decisions of the SRBA Court ordering forfeiture.

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[15] The Agencies footnote that they perfected their water rights *before* those rights were decreed by the SRBA Court. Dkt. 60, at 26 n.5. *Joyce* is clear; to perfect a stockwater right under the so-called constitutional method without a permit, "the appropriator must actually water stock." *Joyce*, 156 P.3d at 520. Since the Agencies admit the "United States did not own the livestock that consumed water under the rights," they must also admit they did not perfect those rights. *See* Dkt. 53-1, at 32-33 ("Water rights must be perfected through beneficial use.").

Since I.C. § 42-224's 2020 codification and 2022 amendment, IDWR has received five petitions for forfeiture, one of which has already been dismissed. Dkt. 43-1, at 26 n.16. In the meantime, the Agencies have pursued principal/agent agreements. *See, e.g.*, Dkt. 35-2. As of September 16, 2020, BLM had secured agreements from approximately 35% of its permittees. Dkt. 36 ¶ 28. And there is always the option of putting Agency livestock on the allotments.

b. Codification of the longstanding common law of stockwater appurtenance is not discriminatory

The Agencies agree that a landowner doesn't own a water right obtained by a tenant unless the tenant acquired the right as the landowner's agent. Dkt. 60, at 23 n.3. From this premise, they conclude that *Joyce* provides no support for I.C. § 42-113(2)(b)'s requirement that stockwater rights associated with grazing allotments are appurtenant to the private "base property" ranch. This is apples and oranges. The premise addresses principal/agent common law codified at I.C. § 42-224(4). The conclusion addresses appurtenance codified at § 42-113(2)(b). In the appurtenance section of *Joyce*, which again the Agencies do not contest, the Court explains why "water rights that ranchers obtained by watering their livestock on federal land were appurtenant to their patented properties." *Joyce*, 156 P.3d at 513-14. Idaho Code § 42-113(2)(b) codifies the common law for Agency lands generally in Idaho, a commonsense reflection of the vast land holdings of the two Agencies in the state.[16] The code provision is not discriminatory. If it did not exist, the *Joyce* precedent would still bind the IDWR, the Agencies, and their grazing permittees in the application of the law of appurtenance to stockwater on federal lands. The Legislature's codification of the precedent does no harm because it does not

[16] Carol Hardy Vincent, Laura Hanson, Lucas Bermejo, Cong. Rsch. Serv., R42346, Federal Land Ownership: Overview and Data (2020) (Tables 1 and 2) (available at https://sgp.fas.org/crs/misc/R42346.pdf).

change the law other than from common law status to statutory status.

c. The Agencies have waived their opposition to beneficial use

The Agencies facially[17] challenge I.C. § 42-502 that states "No agency of the federal government shall acquire a stockwater right unless the agency owns livestock and puts the water to beneficial use. For purposes of this chapter, 'stockwater rights' means water rights for the beneficial use for livestock." They argue the provision lacks *Joyce*'s acknowledgment that the Agencies may acquire a stockwater right through an agent. Dkt. 60, at 23-24. And they posit that *Joyce* is limited to instream stockwater rights.

The Agencies do not acknowledge the Legislature's arguments, incorporated here by reference, addressing these same points in the Agencies' opening brief. *See* Dkt. 53-1, at 21-23; Dkt. 34-1, at 31; *Martinez-Serrano v. Immigr. and Naturalization Serv.*, 94 F.3d 1256, 1259 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 49 (1997) ("Issues raised in a brief that are not supported by argument are deemed abandoned."); *see also George v. Morris*, 736 F.3d 829, 837 (9th Cir. 2013) (waiving argument where defense remained undeveloped in briefing or oral argument).

They further waive their challenge to the statute when they subsequently admit that most of their stockwater claims are beneficial use claims subject to Idaho's law of beneficial use (notes 3 and 4, *supra*). Their admissions paraphrase I.C. § 42-502. They also do not challenge the *Joyce* holding (notes 6 and 7, *supra*) that a water right does not exist in the absence of beneficial use. *Joyce*, 156 P.3d at 520. Idaho Code § 42-502 says a federal stockwater right must be beneficially used for the agency's livestock. Nor does this provision conflict with the ability of an *agent*, as opposed to an "agency," to acquire a stockwater right for the Agencies

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[17] Dkt. 60, at 24 n.4 ("But the United States has not brought an as-applied challenge to that statute.").

consistent with *Joyce* and I.C. § 42-224(4).

d. The Agencies are not harmed by a law that requires water on their lands to be used on their lands for a use that they permit

The Agencies' facial challenge to I.C. § 42-504 misses the mark. They say, without citation, that Idaho "has no authority to dictate how the United States' interests are best served." Dkt. 60, at 29. The questioned state authority is found in the Idaho Constitution, art. XV, § 1, declaring all water in the state to be "subject to the regulations and control of the state" as prescribed by the Legislature as well as Congress's affirmation of that declaration through the Idaho Admission Act, Dkt. 53-1, at 19, affirmation that continues uninterrupted through federal and state court decisions. *Id.* at 17-19.

Again, the Agencies do not acknowledge, and therefore do not refute, the Legislature's arguments. Dkt. 53-1, at 28-29. There can be no burden on the Agencies from a law that prevents removal of stockwater from their lands for other uses, a concern raised by the Agencies themselves. Dkt. 34-1, at 48-49.

e. Legislative intent cannot give rise to a cause of action

As its title makes obvious, Idaho Code § 42-501 is solely an expression of "Legislative Intent." Instead of showing how the section violates any constitutional provision, the Agencies offer it as evidence of illegality of other Idaho Code provisions. Dkt. 60, at 18, 28, 30-31, 53, 64, 67-68. Still, they assert that it should be enjoined. Dkt. 11, at 30; Dkt. 60, at 89. Their claim for relief from this code section can be dismissed for failure to state a claim upon which relief can be granted. *See Henderson v. Terhune*, 379 F.3d 709, 711 (9th Cir. 2004) (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) (holding that legislative policy statement did not give rise to a cause of action)).

Additionally, there is no discriminatory intent in the Legislature's desire to comport state

statutes with the holdings of the state supreme court in the *Joyce* decision, especially when the Agencies profess to abide by *Joyce*. *See* notes 6 and 7, *supra*. Dkt. 60, at 54, 78. Nor is there error in the Legislature's intent that other, substantive code provisions should control forfeiture of stockwater rights. Dkt. 60, at 18. The Agencies' myopic focus on I.C. § 42-501 exemplifies the Supreme Court's admonition that "it is not appropriate to look to the most narrow provision addressing the Government" in search of state discrimination against the federal government. *North Dakota v. United States*, 495 U.S. 423, 438 (1990). Instead, the entire regulatory system must be analyzed. *Id.* at 435; Dkt. 53-1, at 20.

C. The Agencies never converted their partial decrees into property and they misread the State's defense to forfeiture

Water as "property" requires a careful analysis, not the Agencies' conclusory postulate that their partial decrees are federal property absolutely protected by the Property Clause of the U.S. Constitution. Dkt. 60, at 46-48.

As explained in the Legislature's opening brief, *Kleppe v. New Mexico* is not as expansive as the Agencies suggest. Dkt. 53-1, at 29-30. *Kleppe* should be read for its holding that Congress has complete control over "particular public property entrusted to it." *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). Congress has entrusted control over state water to the states. Dkt. 53-1, at 19-20. The courts have recognized this through a litany of federal and state decisions explicated in the Legislature's opening brief. Dkt. 53-1, at 17-19. One such case, cited by the Agencies, makes the point.

In *United States v. Orr Water Ditch Company*, the federal government appealed a district court decision that found that the privately-held water rights in a federal reclamation project had not been forfeited under Nevada's water right forfeiture statutes. 256 F.3d 935 (9th Cir. 2001). The Ninth Circuit held, "[t]he nature and extent of those water rights are determined, in large

part, by Nevada state law." *Id.* at 938-39. The court cited decisions in which, based on state law, it reversed the state water engineer's findings. *Id.* at 941. The court applied Nevada's forfeiture law to the facts in the context to Nevada's evidentiary burdens. The federal government's reclamation project did not require the court to consider the Property Clause; the court relied entirely on Nevada's law of water forfeiture and rules of evidence. In short, state law defines and controls state water as property.

The Legislature fully briefed the Idaho law on the Agencies' property rights. Dkt. 53-1, at 30-33, explaining that the Agencies held a potential use right upon entry of the partial decrees that was contingent on their placing the water to beneficial use. As the Idaho Supreme Court explained, such contingent rights can:

> ripen into a complete appropriation, or may be defeated by a failure of the holder to meet the statutory requirements. The permit, therefore, is not an appropriation of the public waters of the state. It is not real property. It is merely a consent given by the state to construct and acquire real property.

Big Wood Canal Co. v. Chapman, 263 P. 45, 52 (Idaho 1927). Recently, the Idaho Supreme Court reiterated that "failure to put the water to beneficial use is fatal to [a] claim of ownership [of a] water right." *McInturff v. Shippy*, 447 P.3d 937, 946 (Idaho 2019). The Agencies cannot make a Property Clause claim because their partial decrees never ripened into an appropriation through beneficial use. They hold no property that could conceivably be protected by the Property Clause. The Agencies do not address *Big Wood Canal Co*. and only challenge *McInturff* (despite saying they don't challenge Idaho Supreme Court decisions) for its affirmation of the principal/agent exception to forfeiture. Dkt. 60, at 77; *McInturff*, 447 P.3d at 945; note 6, *supra*.

McInturff is also fatal to their claim that I.C. § 42-224 retroactively diminishes their property rights by requiring a principal/agent agreement. Dkt. 60, at 53-55. Again, the

Agencies misread the statute. The principal/agent agreement is a defense to both § 42-222(2) and its implementing procedures in § 42-224. In the absence of § 42-224(4), the Agencies would not have that statutory defense to forfeiture under § 42-222(2) and they would have to rely on the common law pronouncements of the exemption in the *Joyce* and *McInturff* decisions. Stated differently, if, as the Agencies argue, the 5-year lookback procedures in § 42-224 are a cloud on their (unused) partial decrees proscribed by the Property Clause, then § 42-222(2)'s 5-year lookback must also be illegal, yet the Agencies have explicitly waived their challenge to the latter statute through repeated disclaimers in their response brief. *See* note 8, *supra*.

The Agencies also challenge the Legislature's citation of *California v. United States*, 438 U.S. 645 (1978) for its concise history of western water law's "consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 653. The Agencies suggest a better reading of the case is for its limits on state authority. Dkt. 60, at 70 (citing two footnotes in the decision). The Agencies overtax the cited footnotes. The Agencies posture themselves here as did the U.S. Bureau of Reclamation in that case, contending "that it may ignore state law even if no explicit congressional directive conflicts with the conditions imposed by the [State]." *California,* 438 U.S. at 673. The Supreme Court disagreed. "[T]he Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *Id.* at 675. Similarly, the Taylor Grazing Act and Federal Land Management and Policy Act defer to state water law. *See* Dkt. 53-1, at 15-16.

D. The Agencies' settlements are unchanged by appurtenance or forfeiture procedures

The Agencies believe that I.C. §§ 42-113(2)(b) (appurtenance to base property) and 42-224 (forfeiture procedures) violate the Contracts Clause of the U.S. Constitution by disrupting their settlement agreements in the SRBA. Dkt. 60, at 55-57. The Legislature addressed these concerns in its opening brief. Dkt. 53-1, at 35-37. At the risk of repetition, § 42-224 is entirely

procedural; it does not change any substantive rights. The Agencies recognize that before codification of I.C. § 42-224, "no specific statutory procedures existed for applying I.C. § 42-222(2)." *See* note 9, *supra*. Any future defeat of the Agencies' substantive rights will be of their own making by failing to perfect their inchoate partial decrees through beneficial use. Similarly, the appurtenance statute finds support in the uncontested *Joyce* decision that recognized the common law of appurtenance to base property with antecedents predating the Taylor Grazing Act of 1934. *Joyce*, 156 P.3d at 513-14, citing *Bothwell v. Keefer*, 27 P.2d 65, 66-67 (Idaho 1933). The Agencies' settlement agreements were entered into subject to state law. Dkt. 36-3, at 5, 58. They could not amend state law. *Santillan v. U.S.A. Waste of Cal., Inc.*, 853 F.3d 1035, 1045-46 (9th Cir. 2017) (a contractual provision that contravenes public policy, as expressed in or implied from a statute, is either void or unenforceable).

E. None of the challenged statutes are retroactive and a prospective defense to forfeiture doesn't make them so

Consistent with their overarching theme, the Agencies hang their Idaho constitutional argument on I.C. § 42-224's principal/agent defense to forfeiture. Dkt. 60, at 57-61. The Agencies again deflect from their responsibility to use their decreed rights by couching the principal/agent defense as somehow a retroactive element of beneficial use. *Id.* at 60 ("Before its recent legislation, the State had long recognized that the BLM may appropriate stockwater rights with no requirement of proving agency."). The Agencies admit that "of course, Section [42-]224 only applies to future forfeiture proceedings." *See* note 10, *supra*; *Frisbie v. Sunshine Mining Co.*, 457 P.2d 408, 411 (Idaho 1969) (a law is not retroactive merely because the predicate fact to which it applies occurred prior to enactment). Thus, the provision is not retroactive.

The only requirement for appropriating stockwater rights is through instream diversion or acquisition of a permit combined with beneficial use. All BLM needs to do is to water its

livestock using the appropriated water. I.C. § 42-502; *Joyce*, 156 P.3d at 520. In the *Joyce* case, the BLM argued that this sole requirement was invalid under the Supremacy Clause. *Id.* The Idaho Supreme Court corrected the BLM's "misunderstanding of water law." *Id.* Here, BLM (and the Forest Service) perpetuate an alternate misunderstanding that they need an agent to appropriate stockwater. They don't. They need to possess livestock. I.C. § 42-114 ("[T]he watering of domestic livestock *by the person or association of persons to whom the permit was issued* shall be deemed a beneficial use of the water.") (emphasis added). The Agencies do not challenge I.C. § 42-114. If they lack livestock, they risk forfeiture. If forfeiture proceedings commence, they can defend themselves under I.C. § 42-223 ("Exceptions or defenses to forfeiture") or § 42-224(4).

The appurtenance provisions of I.C. § 42-113(2)(b) are not "contrary to a basic tenet of Idaho water law." Dkt. 60, at 59. *Joyce* explained the concept thoroughly. *Joyce*, 156 P.3d at 513-514. The Agencies won't accept the defendants' statements that this statute is prospective only. Dkt. 60, at 59. Nor do they have to. Idaho Code § 73-101 states that it is prospective. ("No part of these compiled laws is retroactive, unless expressly so declared.").

The Agencies cast *In re Hidden Springs Trout Ranch*, 636 P.2d 745 (Idaho 1981) as supporting their claim of unconstitutional retroactivity. *Hidden Springs* is consistent with the line of cases cited by the Legislature holding that water rights only vest if perfected by beneficial use. Dkt. 53-1, at 32-33. *Hidden Springs* did not suggest that a different result would occur if the right had been fully adjudicated as the Agencies suggest. Dkt. 60, at 60. The court simply confined its analysis to the facts before it and disclaimed any discussion of other types of water rights. *Hidden Springs*, 636 P.2d at 746-47.

Lastly, the Agencies repeat their argument that I.C. § 42-504 must be retroactive because

there is no express limitation on its application. Dkt. 60, at 59. The Agencies do not address the Legislature's citation of I.C. § 73-101 or the fact that they have not alleged a beneficiary of the purported retroactivity, without which there can be no constitutional violation. Dkt. 53-1, at 40.

F. A plaintiff is not a defendant and a statute is not a lawsuit

Under the plain language of the McCarran Amendment, the United States has consented to be joined *as a defendant* in suits for the adjudication of water rights or for the administration of such rights. *See* 43 U.S.C. § 666(a). Here, the United States attempts instead to invoke the McCarran Amendment as a plaintiff, not as a defendant. Notably, the Agencies do not cite to any McCarran caselaw, or any cases, interpreting "defendant" to mean "plaintiff."

Nor has the Idaho Attorney General commenced an action in state court against the United States under I.C. § 42-224(10). Yet, the Agencies surprisingly argue that an action "already started with the enactment of Section 42-224 and the subsequent show-cause orders." Dkt. 60, at 46. The Agencies cite no caselaw saying a statute is a lawsuit. Nor is the issuance of a show-cause order. The Director's issuance of an order regarding forfeiture is not the commencement of an action under § 42-224—such orders have no legal effect until the state initiates an action in state court naming the stockwater right owner as a defendant. *See* I.C. § 42-224(9), (11).

The Agencies' citation of *MedImmune, Inc. v. Genentech, Inc.* does not alter the Declaratory Judgment Act's requirement that there be an actual controversy which is justiciable under Article III. *See* 549 U.S. 118 (2007). Before the commencement of a state court action under § 42-224(10), there is no live litigation over I.C. § 42-224 and any declaratory judgment would be an "opinion advising what the law would be upon a hypothetical state of facts." *MedImmune*, 549 U.S. at 127. Further, the Agencies are not being forced to expose themselves to liability or to choose between abandoning their rights or risking prosecution. *See id.* at 129.

As a stockwater right holder, either Agency has the opportunity to show the Director that forfeiture has not occurred, but that opportunity is not the same as being forced to take action in violation of the statute in order to challenge the statute itself.

The Agencies also argue that "whether a claim is ripe turns on whether the issue is fit for decision and whether the parties will suffer hardship if the court withholds review." Dkt. 60, at 45 (citing *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1434 (9th Cir. 1996)). They then claim that the requested declaratory judgment is "plainly ripe because the United States is at risk of losing valuable stockwater rights that they spent decades obtaining." Dkt. 60, at 45. But because no state court action has commenced, they are not at risk. The only implication from this Court withholding review is that the Agencies may, at some point in the future, be named as defendants in a state court action under § 42-224(10) and need to defend that action. This does not compare to the criminal penalties the petitioners in *Freedom to Travel* would have faced if the court there had withheld its review. *See Freedom to Travel*, 82 F.3d at 1435 (finding that such criminal penalties "subject FTC to sufficient hardship"). The Agencies' McCarran Amendment claim is oxymoronic, not ripe, and should be dismissed.

The Agencies next argue that because the term "administration" is ambiguous and does not unequivocally waive forfeiture proceedings, the McCarran Amendment cannot be invoked by the State. Dkt. 60, at 36-44. The Agencies discuss *United States v. Lewis County*, 175 F.3d 671 (9th Cir. 1999), at length. Dkt. 60, at 37-39. That case addressed waiver of sovereign immunity from state and local taxation. The court refused to defer to state taxation principles on issues of interest and penalties. *Lewis Cnty*., 175 F.3d at 676-78. But the Agencies fail to cite the subsequent portion of the opinion in which the court deferred to state law characterizing the real property, holding that Supreme Court precedent required "'application of settled state rules'

geared to state real-property concepts." *Id.* at 678-79 (citation omitted). Here, settled state rules on administration of water rights must be applied. Were it not so, the State could never forfeit the Agencies' water rights for nonuse, rendering Idaho's 1903 forfeiture statute a nullity. But, again, the Agencies admit that I.C. § 42-222(2) *does* apply to them. *See* note 8, *supra.* The Agencies argue that the State's procedures to reach a forfeiture decision are not administrative and do not apply to them. *See* Dkt. 60, at 36-44. The Agencies do not, and cannot, explain how the McCarran Amendment can be interpreted to waive immunity from forfeiture but not the procedures to determine forfeiture. Moreover, the Agencies' Exhibit A to their brief, an SRBA Court decision, works against them. Dkt. 60-1. The Agencies admit the SRBA Court decision defines McCarran's "administration" waiver to include "how each water right on a source is . . . used." Dkt. 60, at 39; Dkt. 60-1, at 19, Ex. A. Forfeiture procedures determine precisely whether a stockwater right been used for the last five years.[18]

G. Where the balance of equities and public interest favor the State and no harm has come to the Agencies, injunctive relief is not warranted

The Agencies cannot obtain injunctive relief because they have failed to show any injury. They cannot show injury under the Supremacy Clause because there is no obstruction of the federal grazing programs necessitating preemption. Dkt. 53-1, at 13-17; *supra* at § II(B). Intergovernmental immunity is inapt because Idaho has primacy over its waters subject only to navigable servitudes and federal reserved water rights. Dkt. 53-1, at 17-19. Congress has explicitly waived any such immunity through the Taylor Grazing Act and Federal Land Policy and Management Act and their implementing regulations and policies. *Id.* at 19-20. And

[18] The Agencies read too much into "tolling rule" as equal to forfeiture administration. Dkt. 60, at 40. That portion of the SRBA Court decision explained that the tolling rule had a "limited purpose" that "did not address water rights administration." Dkt. 60-1, at 20.

Idaho's water laws do not discriminate against the Agencies. *Id.* at 20-29.

The Agencies cannot show injury under the Property Clause because "In the absence of a beneficial use, actual or at least potential, a water right can have no existence." *Joyce*, 156 P.3d at 520 (cleaned up). The Agencies admit that they have not put the water to beneficial use and they do not aver that they intend to do so. They do not challenge the Legislature's statutory and case citations rebutting their concerns about dewatering and monopolization; they merely disagree. *Compare* Dkt. 53-1, at 48-49, *with* Dkt. 60, at 93-94. Allotment dewatering will not occur. Grazing permittees can continue to access the water without a water right as explained by the State. Dkt. 64, at 37-38. Prior permittees cannot use the water on the allotments since their livestock would be in trespass and they cannot remove the water from the allotment. I.C. § 42-504. The BLM urged its monopolization argument in the *Joyce* litigation and lost. *Joyce*, 156 P.3d at 521. The Agencies' remaining allegations of harm are purely speculative, *e.g.*, "Idaho's statutes . . . *will divest* the United States of its property interests in its decreed stockwater rights." Dkt. 60, at 90; the forfeiture statutes allow "*potential* dewatering and/or monopolization of water on federal grazing lands." *Id.* at 93 (emphasis added). As the State Defendants explain, a permanent injunction requires a showing of past, not future, irreparable harm. Dkt. 64, at 35.

The Agencies do not allege any specific injury to their settlement agreements under the Contracts Clause other than a generic reference to "retroactively redefin[ing] stockwater rights." Dkt. 60, at 92. They quote the *Sveen v. Melin* test of "substantial impairment" without saying how they are substantially impaired. Dkt. 60, at 55, 57. The Agencies claim injury from retroactive application of appurtenance (§ 42-113(2)(b)), forfeiture process (§ 42-224), and limits on use (§ 42-504). How, for example, has the prospective application of I.C. § 42-113(2)(b) making stockwater rights appurtenant to the base ranch property harmed the BLM or Forest

Service? They don't say. Under I.C. § 73-101, all three statutes are prospective only.

Nor have the Agencies provided any evidence since the passage or amendment of the challenged statutes variously between 2017 and 2022 of any benefit obtained by any individual or association, a prerequisite for application of the Idaho Constitution on retroactivity. Idaho Const. art. XI, § 12.

The balance of equities and public interest favor the Legislature and other defendants. Here, the contradictions and hubris of the Agencies come to the fore. They state that Idaho has no interest in enforcing its 1903 forfeiture statute, the *only* state statute that could "divest[] the United States of its stockwater rights decreed in conformance with state law." Dkt. 60, at 96. Yet, within the same page, the Agencies affirm the 1903 statute that "has effectively operated for over a century." *Id.* In short, the Agencies are OK with Idaho's forfeiture statute as long as Idaho does not codify any procedures on how to implement it. The Agencies also believe only they can guarantee water for their grazing permittees. *Id.* at 95. Contrary to BLM's declarant, Dkt. 36 ¶ 30, the Agencies are not "the stabilizing force" for Idaho stockwater; the State Defendants are. *See, e.g.*, I.C. §§ 42-1701, 1805 (duties of the IDWR and its Director). Nor do the Agencies contend with the Legislature's Tenth Amendment argument (Dkt. 53-1, at 49); they respond with a single, conclusory sentence. Dkt. 60, at 97.

Since its admission to the Union, the State of Idaho has protected its citizens' interest in watering their livestock. *See, e.g.*, Dkt. 53-2. Congress ratified Idaho's Constitution on water law in the Idaho Admission Act of 1890. 26 Stat. 215. Now, 133 years later, two federal agencies are telling this Court that they, not the State, represent the public's interest despite the State's "full Legislative power" over that water. *Bean v. Morris*, 221 U.S. 485, 486 (1911). In other words, these two agencies no longer "silent[ly] acquiesce[]" to state control of stockwater

water rights in Idaho, *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935); they imply that Congress erred in 1866 and 1877 when it codified that acquiescence, *id.* at 154-56; they disregard the Supreme Court's unanimous affirmation that "the public interest in such state control is definite and substantial." *Id.* at 165. In short, the Ninth Circuit did not err when it held, "there is no federal water law. Fundamental principles of federalism vest control of water rights in the states. Decreed rights are administered under applicable state law." *United States v. U.S. Bd. of Water Comm'rs*, 893 F.3d 578, 595 (9th Cir. 2018). The Agencies espouse allegiance to the State's "general regulatory authority over water rights," Dkt. 60, at 73, but not in the context of balancing of harms or defining the public interest.[19]

III. CONCLUSION

The Court should deny the Agencies' summary judgment motion and grant the Legislature's cross-motion.

Respectfully submitted this 20th day of September, 2023.

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[19] The Agencies oppose bifurcating the merits and remedies phases of this litigation. Dkt. 60, at 97-98. But they do not counter the Ninth Circuit's long-held view that injunctive relief must tailor the remedy to the specific harm and "federalism principles make tailoring particularly important where, as here, plaintiffs seek injunctive relief against a state or local government." *Melendres v. Maricopa Cnty.*, 897 F.3d 1217, 1221 (9th Cir. 2018).